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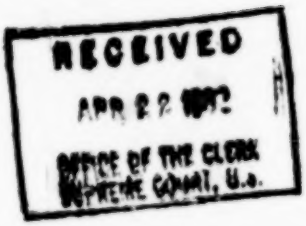
IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1982

NO.



LUIS CARLOS ARANGO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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Petitioner, LUIS CARLOS ARANGO, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme court of Florida, rendered on the 8th day of April, 1982.

OPINION BELOW

The full opinion of the Supreme Court of Florida is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) to review the judgment and opinion of the Supreme Court of Florida rendered on April 8, 1982.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN EXCUSING A VENIREMAN, OVER THE DEFENDANT'S OBJECTION, WHERE THAT VENIREMAN NEVER STATED UNEQUIVOCALLY THAT HIS BELIEFS CONCERNING CAPITAL PUNISHMENT WOULD PREVENT HIM FROM SITTING AS A QUALIFIED JUROR?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the provisions of Florida law set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner, LUIS CARLOS ARANGO, has been sentenced to death by electrocution for first degree murder [Appendix A]. During the jury selection process, the trial court excused a venireman (Alvarez) for cause. The record in the case at bar reveals the following lengthy colloquy with venireman Alvarez concerning his views on capital punishment and his ability to sit as a qualified juror in this case:

MR. KAHN: I ask you to speak up, if you do. Does anybody sitting on this panel have any moral or religious beliefs that would prevent you from sitting in judgment of another person for his actions, because that's what you are doing. You are actually going to determine whether this man is guilty and should be punished appropriately, or not guilty.

That's sitting in judgment of your fellow man.

Mr. Alvarez?

JUROR ALVAREZ: I am against the death penalty.

MR. KAHN: Okay.

We are now going to get to that in a second. I want to ask you just this one question at this point. It is a first degree murder case which means you can be punished one of two ways. Number one, by the death penalty, or, in the alternative, by the Judge, who does the sentencing; not the jury, the Judge. And number two, by life imprisonment. And there are only two ways if the Court deems that it deserves the death penalty, the Judge has that final decision.

However, the jury that sits in this case makes a recommendation based on the facts in a separate proceeding, apart from guilt or innocence.

It's like a two-stage trial.

Now, would the fact that you are against the death penalty, is that feeling that you have so strong that it would even prevent you from coming back with a guilty verdict on the fact, aside from what the penalty is? Just the fact that he may get the death penalty in the end by the Judge?

JUROR ALVAREZ: I believe so.

MR. KAHN: If, in fact, the State proved its case, Mr. Alvarez, beyond and to the exclusion of every reasonable doubt, and the evidence was so overwhelming that, in fact, this man, in your mind, is guilty of first degree murder, would you be able to come back with a verdict of guilty of first degree murder with the knowledge, again, even though all the evidence is there of the charge, that the death penalty may be in the background? Not when it's a questionable situation, but where the evidence is so overwhelming that in your mind that you say, "My God, this man is guilty of first degree murder as charged." Would you still not be able to return a verdict of guilty.

JUROR ALVAREZ: I am really not sure because it conflicts with my moral beliefs.

MR. KAHN: Okay.

Let me give you one other question. I will be asking this of probably every one of you sitting on the panel.

Mr. Alvarez, do you ever foresee a set of facts that may be so heinous, so cruel and meeting all the criteria that Her Honor will instruct you is the criteria before you can recommend death, meaning a good number of those aggravating circumtances that would warrant the death penalty. Do you ever foresee a circumstance like that where you could warrant the death penalty?

JUROR ALVAREZ: Yes, it's possible.

MR. KAHN: So, there is a possibility of you recommending the death penalty in the end?

JUROR ALVAREZ: Right.

MR. KAHN: Okay. (TR I 15-17)

* * *

MR. KAHN: Now, you said you are morally opposed to the death penalty. With that in mind, would you still be able to follow his Honor's instructions on the law and disregard the consequences of your verdict? In other words, in the first phase vote just on the evidence and the crime charged, and would you be able to do that?

JUROR ALVAREZ: In the first phase I can vote on the evidence that's been presented.

MR. KAHN: Okay.

What I am saying is if the State proves the Defendant guilty beyond and to the exclusion of a reasonable doubt, are you able to vote guilty based on the law that His Honor is going to give you?

JUROR ALVAREZ: I don't believe so, sir.

MR. KAHN: You will not vote no matter what, guilty of first degree murder.

JUROR ALVAREZ: No, sir.

MR. KAHN: Is that due to the fact of the possibility of a death sentence?

JUROR ALVAREZ: Yes, sir.

MR. KAHN: Your Honor, I make the same request of Mr. Alvarez.

THE COURT: Your witness, Mr. Flynn.

MR. KAHN: Thank you, sir.

MR. FLYNN: Mr. Alvarez, I don't want to put you on the spot, sir, but could you explain why you could not decide based on the evidence whether my client is guilty of first degree murder in the first phase of the trial?

JUROR ALVAREZ: Because I am morally opposed to the death penalty. If I were to decide guilt, he would probably get the death penalty.

MR. FLYNN: Okay.

JUROR ALVAREZ: It's only if I am asked to decide if he should receive capital punishment that bothers me. It's not the determination of guilt or innocence. But, the latter part.

MR. FLYNN: Okay. The latter portion.

Do you understand from what's been said that the most your job would be would be to make a recommendation by a majority verdict to the Judge who would have the final say?

JUROR ALVAREZ: Right.

MR. FLYNN: Who could disregard your recommendation completely?

JUROR ALVAREZ: Yes, I understand that.

MR. FLYNN: What I want to be certain of is to have a jury that is a cross-section of this community to decide the guilt or innocence of my client. I take it that you have no problem understanding what the -- understanding evidence from the witness stand in this case?

JUROR ALVAREZ: No, I wouldn't have that problem.

MR. FLYNN: You strike me -- is that you have no problem understanding what the law is as the Judge instructs you on the law. Do you think that being in that situation and knowing, as I have indicated before, that there is not going to be any plea to a jury or find the man not guilty because of the death penalty? There's not going to be any of that that you could, in the first phase, fairly and objectively decide whether or not the Government has proven my client guilty beyond a reasonable doubt of first degree murder or any other crime?

JUROR ALVAREZ: Yes, I would be able to.

MR. FLYNN: Okay.

I take it then, it's the second phase that gives you problems.

JUROR ALVAREZ: Yes.

MR. FLYNN: Would it be fair to say that you would be, because of your moral objections to the death penalty be hard put to recommend the death penalty for most any situation?

JUROR ALVAREZ: Yes, sir.

MR. FLYNN: Okay.

Now, Her Honor will not just if it ever gets that far, Her Honor will not just ask you all to go back there and reach a recommendation. What Her Honor would do would give you some guideline, what they call aggravating circumstances and mitigating circumstances to consider. So, it wouldn't be just a blind recommendation based on belief or disbelief in the death penalty. It would be a reasoned decision based on guidelines.

Do you think that if the guidelines strongly enough indicated the death penalty, that even though you personally are morally opposed to the death penalty, you could accept and listen to the viewpoits of fellow jurors who might recommend the death penalty?

JUROR ALVAREZ: I think so.

MR. FLYNN: Okay.

And do you think at this point at least, you could keep an open mind so that under some set of facts, because you don't know any of the facts yet.

JUROR ALVAREZ: Right.

MR. FLYNN: Under some set of facts, perhaps your fellow jurors could even persuade you that under the law in this case the death penalty was the appropriate recommendation from the jury?

JUROR ALVAREZ: Under certain facts, yes, I could.

MR. FLYNN: Okay.

I have no further questions.

Thank you.

THE COURT: Let me ask you this question: Could you make an impartial and fair determination of the Defendant's guilt of first degree murder based upon the evidence that you have heard, based upon the law that I will give you and eliminate, in making that determination, your feelings against the death penalty, knowing that you will then have to decide whether the death penalty will be applicable?

JUROR ALVAREZ: Sir, Your Honor, I don't believe that I can eliminate my moral beliefs against the death penalty.

THE COURT: Juror will be excused for cause.

MR. FLYNN: Your Honor, for the record, I would object.

THE COURT: So noted.

MR. KAHN: Can I just ask him one more question?

THE COURT: Go ahead.

MR. KAHN: Would your moral beliefs against the death penalty be so overwhelming and so influential that it may affect your determination as to guilt or innocence of first degree murder?

JUROR ALVAREZ: Can you ask that question again?

MR. KAHN: This moral conviction that you say you have against first degree murder, against the death penalty, would that feeling and belief be so strong and overwhelming that it would influence your verdict regarding guilt or innocence.

JUROR ALVAREZ: It really depends on the facts of the case.

MR. KAHN: Okay.

So your statement is no, it wouldn't affect your determination of guilt or innocence?

JUROR ALVAREZ: In certain circumstances.

MR. KAHN: Okay.

If Her Honor were to instruct you that not at all should it ever influence a question of guilt or innocence, would you be able to follow that instruction completely, and not be affected by your moral belief in determining the guilt or innocence phase?

JUROR ALVAREZ: No, sir I don't believe so.

MR. KAHN: Okay.

THE COURT: Juror is excused for cause (TR I 99-105).

On July 15, 1980, after the jury had been chosen, the petitioner's trial reconvened, ultimately resulting in the Petitioner being found guilty of first degree murder and possession of cocaine.

A direct appeal was pursued to the Supreme Court of Florida, which court affirmed the judgment of conviction and sentence, finding that the record "clearly reveals that the venireman [Alvarez] could not render an impartial decision as to Appellant's guilt" [Appendix A][1] In so ruling, the Court found the case of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770 (1968) to be inapplicable to the facts of the case at bar.

Petitioner moved the Florida Supreme Court for a rehearing of the case, which petition was denied.

This timely Petition for Writ of Certiorari follows:

REASONS FOR GRANTING THE WRIT

In Witherspoon v. Illinois, 391 U.S. 510, 522 fn. 21, 88 S.Ct. 1770 (1968), this Court held that veniremen can be removed for cause only when they state, unmistakably and clearly: 1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the cause before them; or, 2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the Defendant's guilt.

In a long line of decisions, this Court has consistently upheld the Witherspoon standards and has further added the caveat that no jury from which even one person has been excused on broader Witherspoon-type grounds than these may impose a death penalty or sit in a case where the death penalty may be imposed. See Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); and Davis v. Georgia, 429 U.S. 122 (1976).

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1. Although concurring in the majority opinion affirming guilt, two justices dissented from the affirmance of the death sentence, finding that "life imprisonment and not death is the appropriate penalty." [Appendix A]

In the case sub judice, a review of the colloquy between venireman Alvarez and the Court demonstrates that excusal for cause defies both logic and the law. The conviction of the instant Petitioner, if allowed to stand, can only serve to further the erosion of the Sixth and Fourteenth Amendment guarantees of trial by an impartial jury.

> THE TRIAL COURT ERRED IN EXCUSING VENIREMAN ALVAREZ FOR CAUSE, OVER THE DEFENDANT'S OBJECTION, WHERE ALVAREZ NEVER STATED UNEQUIVOCALLY AND CLEARLY THAT HIS BELIEFS CONCERNING CAPITAL PUNISHMENT WOULD PREVENT HIM FROM SITTING AS A QUALIFIED JUROR

With regard to the first prong of the Witherspoon test, venireman Alvarez' answers reveal that at no time did he make "unmistakably clear" that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial." Witherspoon, supra. To the contrary, as the above in trial underlined portions of the record indicate, venireman Alvarez, on five separate occasions affirmatively stated that under certain facts he could recommend the imposition of the death penalty (TR I 17, 103).

Thus, if the excusal of venireman Alvarez for cause in this case can be justified, it must be under the second Witherspoon standard, i.e., his views on capital punishment were such as to prevent him from being able to determine impartially the guilt or innocence of the Defendant.

The Florida Legislature, in apparent consistency with the principles of Witherspoon, has promulgated Florida Statutes §913.13, which specifically addresses the issue of jurors' beliefs concerning capital punishment, as follows:

> Jurors in capital cases--a person who has beliefs which preclude him from finding a defendant guilty of an offense punishable by death shall not be qualified as a juror in a capital case.

In construing the foregoing statute and its predecessor, Florida Statutes §932.20, the Florida Supreme Court has repeatedly held

that, before a juror may be excused for cause pursuant to Witherspoon, the record must establish with the "requisite amount of definiteness," Portee v. State, 253 So.2d 866 (Fla. 1971) that the excused juror held views which "precluded" or "prevented" him from finding the defendant guilty, Perkins v. State, 228 So.2d 382 (Fla. 1969), or that the questioning of the defendant revealed a "refusal" or "intransigent determination" not to weigh the evidence at trial as to guilt or innocence. Williams v. State, 228 So.2d 377 (Fla. 1969).

In the instant case, by no possible stretch of the imagination can it be said that venireman Alvarez' views toward capital punishment placed him within these strict legal parameters. First, logic itself refutes such a conclusion. For, as previously indicated, Juror Alvarez stated on five occasions that, under certain circumstances, he could recommend a sentence of death for a defendant convicted of first degree murder. This being so, it is difficult to understand how one could then argue logically that the prospect of the death penalty would produce an "intransigent determination" on the part of Juror Alvarez not to weigh the evidence at trial as to gult or innocence. Williams, supra.

More critical, however, is the fact that, as the record indicates, venireman Alvarez' responses to the prosecutor and the Court only went so far as to demonstrate that, in determining the Defendant's guilt or innocence, he could not "eliminate" his moral belief against the death penalty, and that these beliefs might "affect" or "influence" him in determining the defendant's guilt or innocence.

The mere fact that a juror's feelings about the death penalty might "affect" or "influence" his deliberations as to an issue of fact is an insufficient basis under Witherspoon upon which to disqualify such a juror. Adams v. Texas, ___U.S. _____, 100 S.Ct. 2521 (1980); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), 626 F.2d 396 (5th Cir. 1980) (en banc).

Both Adams and Burns involved §12.31(b) of the Texas capital sentencing statute. Under Texas' bifurcated system, as here, at the sentencing proceeding, the jury is required to answer questions concerning aggravating and mitigating factors. If the jury under §12.31(b) answers yes to each of three questions, the Court must impose a death sentence. Otherwise, the Court must impose a sentence of life imprisonment. In both Adams and Burns, the trial court, pursuant to §12.31(b), excluded jurors who were unable to take an oath that the mandatory penalty of death or life imprisonment would not "affect" their deliberation on any issue of fact. In reversing the imposition of the death penalty, both the Adams and Burns courts held that unless it is shown that the "influence" or "affect" upon the juror is a "disabling" or "insurmountable" one, to the extent that the juror will be "unable" or "unwilling" to obey properly his or her oath, any such excusal of them would be on grounds broader than that allowed by Witherspoon and violative of the Sixth and Fourteenth Amendments to the Constitution of the United States.

In Burns, a prospective juror's improper exclusion was explained as follows:

> [T]hree times in succession Mrs. Doss stated that she did not believe in the death penalty, following with an affirmation that it would affect her deliberations on any issue of fact in the case. These are strong expresions indeed, but they fall short of unequivocal avowals disqualifying her under either aspect of Witherspoon's two-pronged test.
>
> 626 F.2d at 397-98.

What was stated by the panel opinion in Burns, supra, at 1301, concerning the failure of the record to make unmistakably clear the grounds for juror Doss' disqualification, is equally applicable to juror Alvarez' disqualification herein:

> She could have been asked whether, despite her expressed convictions, she could put her disbelief aside and do her duty as a citizen. Her answer might have been that she could. Or she could have been asked what effect the presence of a possible death sentence would have on her deliberations. Her answer might have been that she would wish to be very sure of guilt, to be thoroughly convinced, before she could find fact in such a way that the death penalty might result. Either answer would doubtless have rehabilitated her for jury service. An answer that she would not take or could not comply with the required oath not to be "affected" in her deliberations would doubtless, upon a proper definition of "affected" as meaning "disabling" or "insurmountably" affected, have clearly disqualified her. To be sure, these are mere speculations about what her answers to such questions might have been. The point is that nothing in her actual answers forecloses them. Her mere acknowledgment that the penalty would "affect" her deliberations does not do so: what candid and responsible citizen would not admit as much, could truthfully swear the proposition to be one of no concern whatever?
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> • • •
>
> This being true, the mere reply by Mrs. Doss that the potential penalty would "affect" her is insufficient to permit her disqualification. Such an ambiguous answer spans the range of possible effects on her from a mere heightening of the seriousness with which she might approach her deliberations as a juror, through conscientious and moral dilemmas foreseen, to an utter refusal to deliberate rationally at all. More than this was required for her disqualification, and more was denied.

Thus, while the State may, consistent with Witherspoon, bar from jury service those persons whose beliefs about capital punishment would prevent them from considering impartially the defendant's guilt or innocence, in the instant case the prosecution and the trial court erroneously applied the law so as to exclude a juror whose only fault may have been "to take his responsibility with special seriousness or to acknowledge honestly that he might or might not be affected." Adams, supra, at 2529.

In Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), appellant Granviel asserted that five veniremen were improperly

excluded for cause, in violation of Witherspoon. The Fifth Circuit Court of Appeals found that, under Witherspoon, a venireman "may be excused for cause only if he is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings'", and that "the state retains the right to exclude only those veniremen who:

> ma[k]e unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
>
> Granviel v. Estelle, 655 F.2d at 677, citing Witherspoon, 391 U.S., supra, at 522 n.21.

The Granviel panel stressed its "commitment to ensuring strict adherence to the mandates of Witherspoon, 655 F.2d at 677, citing Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980) (en banc), supra. Thus, the statements made by the venireman in the instant case should have been construed strictly in favor of allowing the venireman to remain on the jury.

Petitioner would further direct the Court's attention to Alderman v. Austin (5th Cir.), No. 80-7820 (December 11, 1981), James C. Hill, Circuit Judge. In Alderman, three potential jurors were dismissed for cause when they stated that they could vote to impose capital punishment but could not, if elected foreman, write out the verdict on the indictment and sign their name as foreman. In reversing the death sentence, the Fifth Circuit held that whether a venireman could sign, in good conscience, a verdict which would result in a defendant's execution is immaterial to jury service under Witherspoon.

In conclusion, the closing words of this Court in Adams, supra, in reversing the sentence of death, are controlling herein:

> It does not appear in the record before us that these individuals were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Accordingly, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which such prospective jurors have been excluded.

CONCLUSION

The death sentence of LUIS CARLOS ARANGO is a byproduct of the growing disregard evidenced by the judicial system for the constitutional safeguards which ostensibly assure every man a fair trial by an impartial jury. This Court should neither condone nor acquiesce in the destruction of Sixth and Fourteenth Amendment guarantees.

WHEREFORE, this Court's supreme review, the final safeguard, is hereby requested.

Respectfully submitted,

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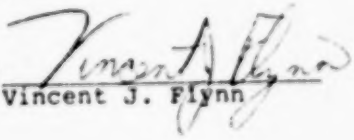
By: 
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